Iowa Land Recycling Program
General Information

INTRODUCTION

The Iowa Land Recycling Program (or **LRP**) is a program administered by the Iowa Department of Natural Resources (DNR) for the purpose of addressing contaminated properties. Enrollment in the program is voluntary, however, there are rules which must be followed in order to successfully complete the program and to receive those benefits associated with completion.

The **LRP** bears some similarity to other programs administered by the DNR, relating to environmental contamination, and to voluntary programs conducted by other states, however, there are some major differences. The program should not be entered with preconceived notions based on these other programs

History - The "Iowa Land Recycling Program and Remediation Standards Act" was enacted by the Iowa legislature in 1997. Rules were subsequently drawn up under the direction of a technical advisory committee and finally adopted by the Environmental Protection Commission in late 1998. These rules are contained in Iowa Administrative Code (IAC) 567-137(455H), referred to as Chapter 137, or the **LRP**.

Purpose - The **LRP** came about because of concerns that real or perceived contamination may prevent property from being put to its best use. This may lead to the unnecessary development of farmland or other open-space or natural areas, accompanied by expenditures to develop new infrastructure. In order to promote wiser use of resources, the **LRP** encourages participants to clean up contaminated property or otherwise take steps to insure that the threats posed by contamination do not result in harm to human health or the environment. Successful completion of the program may permit property to be put to better uses, may permit easier transfer of property, and may remove the stigma often associated with properties which are contaminated or perceived to be so.

Eligibility - The program is open to a broad range of would-be participants and to a wide spectrum of contamination situations. Participation is <u>not</u> limited to those who are "legally responsible" for the contamination, nor does the participant need to be the property owner. As long as the property in question is accessible to the participant, the participant's agents, and the

DNR, for purposes of carrying out the program, and the type of situation is not specifically excluded, the site should be eligible for enrollment.

Excluded - Though the **LRP** is open to most types of contaminated sites, there are some specifically excluded categories. Excluded from participation are:

1. petroleum releases from underground storage tanks subject to regulation under Chapter 135 of the department's rules (releases of other regulated substances from underground storage tanks are generally eligible);
2. properties which are on, or are proposed for inclusion on, the National Priorities List (NPL) under the federal Comprehensive Environmental Response, Compensation, and Liabilities Act (known also as CERCLA or "Superfund");
3. animal feeding operations as defined in the **LRP**;
4. properties subject to some types of enforcement actions or consent orders, unless the enforcing agency approves the enrollment; and
5. properties where there is a commingling of eligible and ineligible situations, unless the department determines that enrollment is appropriate, as described in rule.

In addition, certain types of releases are excluded from inclusion in the **LRP**, including:

1. workplace exposures with respect to the claims of exposed parties against their employers;
2. emissions from engine exhaust;
3. specific nuclear materials; and
4. pesticides used according to the product label.

Incentives - Protection of human health and the environment along with promoting the "recycling" of already developed properties are goals of the **LRP**. There are also other incentives for participants. The rules outline a procedure for assessing and addressing known contamination as well as identifying means for finalizing activity at a site. In addition, there is broad flexibility in the choices available for response actions, including options for applicable standards and the availability of institutional controls to supplement or, in some cases, replace traditional remedial procedures. Perhaps the most attractive incentive is the no further action certificate attached to successful completion of the program. This certificate grants a limited indemnification and regulatory sign-off for the situation addressed in the **LRP**.

Program fees - Participation in the LRP does entail some fees to be paid to the DNR. An application fee of **$750** is due at the time the application is made. In addition, participants are required to reimburse the costs incurred by DNR for the oversight of projects, up to a maximum of **$7500**, inclusive of the application fee.

PROGRAM DETAILS

The following is a discussion of some concepts and terms critical to the **LRP**.

Affected area - The concept of the "affected area" is critical to the program, however, it may also be one of the most confusing because it represents a point of significant difference from many programs dealing with the contaminated properties. The term "affected area" is defined in rule to mean "any real property affected, suspected of being affected, or modeled to be likely affected by a release occurring at an enrolled site." The LRP is designed to address affected areas. An enrolled property may have more than one affected area, these will be dealt with individually, though they may be the subject of the same enrollment and participation process. On the other hand, an affected area may cross property boundaries and the entire affected area is to be enrolled in the program. This latter situation should be carefully considered before enrollment, because it will likely require the cooperation of the owners of neighboring properties within the affected area. In the event that there are potential problems related to securing the cooperation of neighboring property owners, it may be advisable to discuss the situation with DNR. Please note, it is not the purpose of the LRP to pronounce that a piece of real estate is "clean", the LRP is not a substitute for the ASTM Phase I or Phase II Environmental Assessment (which is not a DNR program). The LRP is intended to address known and identified contamination.

Contaminants of concern - These are defined in rule as "specific hazardous substances that are identified for evaluation in the risk assessment process." Just as the LRP is not intended to cover property in general the program is not designed to address vague or general contamination concerns at a site. The intent is that a site be enrolled because of concerns related to known contaminants existing in identified areas. Successful completion of the LRP process will result in a no further action certificate, with associated immunities, only for those contaminants for which the site was enrolled and for which the necessary program steps have been successfully completed.

Exposure route - This term refers to the means by which a person might be exposed to a contaminant, e.g., ingestion, inhalation, dermal contact, etc. Greatest attention is given to the ingestion route, which will be considered at all sites. However, the DNR or the participant may determine that other routes of exposure are of concern and should be evaluated (e.g., vapors in a basement leading to an inhalation threat), if not evaluated the protections under the no further action certificate do not apply.

Institutional control - This is defined in rule as "a nonphysical action which restricts land use to reduce or eliminate exposure to the contaminants of an affected area." Generally they are legal mechanisms which prevent certain uses or activities at a property or within a jurisdiction, thereby preventing or decreasing the likelihood that persons will be exposed to certain contaminants. Examples that have been used in the past include such diverse things as deed restrictions on

specific property, zoning regulations, and local ordinances. These vehicles are used to prevent activities (e.g., excavation or well installation) or to prevent certain uses of property along with their presumed exposure concerns (e.g., prohibition of residential or other high contact uses). In some cases institutional controls are used to supplement traditional cleanup activities. However, they are increasingly used as an alternative to cleanup procedures in cases where cleanup is not technologically feasible, is cost prohibitive, or where threats to health or the environment do not seem serious enough to warrant cleanup, but some precautionary steps seem prudent. Institutional controls have been available in the past but have been used sparingly because available rules did not specifically address them. The LRP makes it clear that they are an acceptable alternative under the appropriate circumstances, as laid out in the rules. In addition the institutional control of choice will be the environmental protection easement established by the legislature for this program.

Environmental protection easement - This is "an institutional control created under the LRP portion of the Iowa Code which is a statutorily authorized restriction on land use." The easement runs with the land, is granted to the state, and specifies the restrictions or requirements of the institutional or technological control pertaining to the specific site. It provides a means of standardizing institutional control and avoiding the weaknesses of some controls. For further information, rule and statute should be consulted.

Technological control - This term may not be commonly understood. As defined in rule it is "a physical action whose main purpose is to reduce or eliminate exposure to the contaminants of an affected area." In general, technological controls are not designed to clean up the contamination but to prevent exposure to it. In some cases identical technologies may be used for cleanup or technological control depending on the specific situation, e.g., groundwater pump-and-treat might be viewed as a way to clean up groundwater in one case whereas it is used as a technological control to contain contamination and prevent it from reaching a well in another case. Other examples of technological controls might consist of fencing to control access to a contaminated area of soil, thereby eliminating the exposure threat, or perhaps paving or capping an area of contaminated soil to prevent exposure. When a technological control is chosen as a remedy for a site, it must be accompanied by an institutional control that assures appropriate maintenance of the technological control.

Standards - Another innovation introduced in the **LRP** is the range of standards available for application at an enrolled site. (In-depth discussion of these standards is beyond the scope of this introductory document. Interested parties are advised to confer with DNR staff or consult the rules and guidance for more detail.) Although these standards provide for considerable latitude, they cannot be applied indiscriminately. The selection of the background standard or a site-specific standard will require that some justification be approved by the DNR and a site-specific standard will almost certainly require that institutional/technological controls be put in place.

Background standard - The background standard is intended to recognize that some compounds, considered to be contaminants, exist naturally in the environment or that there are situations where contamination is widespread and often historical. The application of the background standard to these situations recognizes that the participant should not be held responsible for that portion of contamination not originating on the site in question. It should be noted that this standard is not intended to apply in the case where contamination can be traced back to an identifiable off-site source.

Statewide standard - The statewide standard represents a starting point for the evaluation and remediation of a site. Rule requires that a statewide standard be exceeded in order to demonstrate eligibility for the LRP. When statewide standards are met after cleanup, the no further action classification will likely be free of institutional controls. The statewide standard will normally be used as the permissible exposure limit in the calculation of site-specific standards. This standard should not be regarded as a universally safe level of contamination, it must be applied in a fashion consistent with the assumptions built into it, i.e., ingestion of the contaminated medium. A universally applicable, safe standard, which would be protective for all possible exposure routes, including transfer between media, would have to be more stringent.

Site-specific standard - Though the rule concerning site-specific standards may indicate some particular numbers for some compounds, the standard should be recognized for its flexibility. Some suggested options are spelled out, but the participant has the option of calculating a standard specific to the site in question, provided that it can be justified to the DNR. Because site-specific standards will generally entail some contamination being left in excess of the statewide standard, it will be necessary to put institutional/technological controls in place.

THE PROCESS

The start-to-finish process for successful completion of the **LRP** is somewhat flexible. The following is a brief summary of steps that might be taken in order to complete it. Pay particular attention to whether a given step is *recommended* or *mandatory*. The DNR encourages a collaborative approach to the **LRP** allowing for a more open and flexible process.

1. Discuss the proposed project with the DNR. We may be able to help determine whether the **LRP** is or is not the best approach for a site. It may be possible to identify potential impediments to completion of the program at an early stage, so that they might be appropriately addressed in advance. *Recommended*.

2. Submit the application form. Supporting information may be quite extensive. A guidance document is available for your assistance. The $750 application fee is to be included. *Mandatory*.

3. After a site is accepted into the LRP it will be necessary to draw up a participation agreement. This document covers topics including: property access for the DNR, reimbursement for oversight costs, financial assurances, project scoping, and the development of a general timetable. *Mandatory*.

4. The participant may wish to submit a site assessment plan, prior to carrying out field work and writing a site assessment report. This gives an opportunity to get DNR concurrence that the scope of the assessment is not deficient or it may give an opportunity for the DNR to identify where the proposed efforts go beyond what is necessary. Serious consideration should be given to which contaminants are to be included and which exposure routes are of interest or concern. *Recommended*.

5. The site assessment field activities and the subsequent development of the site assessment report are carried out. These should be tailored to the situation(s) in question and must address points identified in the rule.

   alternatively

   Participants seeking to expedite the process may conduct site assessment work and proceed to the risk evaluation/response action phase without a report or review, provided that prior notice of this intention is given to the DNR along with certain information described in the rule. One of these alternatives is *Mandatory*.

6. It may be advisable to secure DNR approval of the completed site assessment report. This insures that there is concurrence with the effort to this point and that a project is not headed down the wrong path, potentially invalidating subsequent work. *Recommended*.

7. In the risk evaluation/response action phase the participant is expected to evaluate current and future risks posed by contaminants at the site. This is not evaluated in the same way as other programs, please follow the rule carefully. *Mandatory*.

8. Also, in the risk evaluation/response action phase, the participant must develop an appropriate and acceptable response action or strategy to address any unacceptable exposures or potential exposures which have been identified. The standard (background, statewide or a site-specific standard) to be applied must be identified and a strategy to verify compliance (following implementation of any necessary response action) must be established in accordance with the rule. *Mandatory*.

9. A risk evaluation/response action document must be submitted to the department, in accordance with the guidelines in rule. *Mandatory*.

10. It is advisable to secure the approval of the risk evaluation/response action document by DNR prior to proceeding with the implementation of any response or the conduct of compliance sampling. This serves to increase the likelihood that DNR will approve the completion of the project at the end.

    alternatively

    If the participant wishes to proceed to the implementation of the response action, without prior DNR approval, then the proposed risk evaluation/response action document must be accompanied by an explanation of the reasons for proceeding without approval. Other information will be required, as provided for in rule. One of these options is *Mandatory*.

11. The implementation of any necessary response action is a no frills approach, marking a departure from some other programs. Plans and specifications, other in-process reports, etc. are not required. Just do it.

12. Successful completion of the LRP requires a demonstration of compliance. This involves environmental sampling in the affected area, according to protocols specified in the rule, and it may take a period of time. *Mandatory*.

13. The final work product for the participant will likely be the final report. This document will report on any remedial activities, summarize the results of compliance sampling, and establish that any necessary institutional or technological controls are in place.

    alternatively

    If the participant has elected to follow the minimal review, expedited option, then the final report must contain, in substance, the information which would have been contained in the site assessment and risk evaluation/response action documents. This is in addition to information otherwise required in the final report. One of these options is *Mandatory*.

14. DNR approval of the final report will be the last step prior to the issuance of a no further action certificate. *Mandatory*.

15. Issuance of the no further action certificate will mark the successful completion of the LRP. In some cases this may be provisional based on the results of some continued monitoring and/or the maintenance of necessary institutional or technological controls.

FINAL COMMENTS

In most cases the issuance of a no further action certificate will confer on the participant and his successors the liability protections described in the rule. However, there are provisions for reopening a site and possibly revoking the no further action status if it is determined that necessary institutional or technological controls are found ineffective and cannot be or are not corrected. A no further action classification may also be revoked or enrollment may be terminated on the basis of fraud, misrepresentation, or failure to disclose material information. In addition, enrollment may be terminated in the event of significant failure to comply with schedules or a failure to pay required fees.

Participants should also be aware that they may withdraw from the program at any time. Written notice must be provided to DNR and a plan must be submitted and implemented to stabilize conditions at the site, as specified in rule. The $750 application fee is not refundable and the participant may be liable for any oversight costs incurred by the DNR, subject to the $7500 limit. All benefits and immunities attached to participation in the **LRP** are forfeit.

This is a general information document intended to acquaint the reader with major features of the LRP. It does not exhaustively summarize the law or rules. Participants are encouraged to consult the rules, other guidance documents, and to confer with the department for more detailed information. If you have questions, please feel free to call Cal Lundberg at 515/281-7040.